IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-0624

JOHNSON COUNTY EQUITY NO. EQCV074310

FIRST AMERICAN BANK AND C.J. LAND, L.L.C.,
Plaintiffs/Appellees

VS.

FOBIAN FARMS, INC.; HOOVER HIGHWAY BUSINESS PARK, INC.; GATEWAY, LTD.; GATEWAY PROPERTIES, LTD.;
Defendants/Appellants

GATEWAY COMMERCIAL CONDOMINIUMS OWNERS ASSOCIATION; JERRY L. EYMAN; AND JAN G. EYMAN,
Defendants

FOBIAN FARMS, INC.,
Cross-Claimant,

VS.

JERRY L. EYMAN; GATEWAY COMMERCIAL CONDOMINIUMS OWNERS ASSOCIATION,
Cross-Claim Defendants.

Appeal from the Iowa District Court for Johnson County
The Honorable Ian K. Thornhill, Judge

APPELLANTS' APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION DATED JANUARY 11, 2017

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QUESTIONS PRESENTED FOR REVIEW

The following questions arising from the Court of Appeals' decision are presented for further review by the Iowa Supreme Court:

1. Whether the Trial Court abused its discretion by assessing the Fobian Defendants the entire amount of Plaintiffs' legal expenses as a sanction under Iowa Rule of Civil Procedure 1.413 even though most of these expenses were not incurred as a result of properly sanctionable conduct.

2. Whether the Trial Court abused its discretion by considering Fobian's post-trial, critical but not profane, threatening or disrespectful, letter written to the Iowa Supreme Court in its decision to assess sanctions.

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I. STATEMENT SUPPORTING FURTHER REVIEW

In this quiet title and reformation action the Trial Court assessed the entirety of Plaintiffs' legal expenses, approximately $135,000.00, against Defendants Fobian Farms, Inc., Hoover Highway Business Park, Gateway, Ltd and Gateway Properties Ltd. (hereafter "Fobian") as a sanction under Iowa Rule of Procedure 1.413 because it found that Fobian defended against the Plaintiffs' claims for an improper purpose. Uniquely, however, these same sanctioned Defendants were also awarded damages for what the Trial Court found to be a trespass on Fobian's property.

As justification for the sanction award the Trial Court considered and relied on a post trial letter written by Fobian's president to the Iowa Supreme Court. This letter was critical of the litigation outcome but was not threatening, profane or in any way indicated that the Trial Court's decision would not be complied with or that other litigation would be pursued. (Addendum Page i)

The legal expenses which made up the sanction amount included time spent prior to trial, expenses incurred by the Plaintiff in dealing with claims raised by other Defendants, and expenses otherwise unrelated to any conduct of the sanctioned Defendants.

The decision of the Trial Court and Court of Appeals is contrary to the plain language of Iowa Rule of Civil Procedure 1.413, which limits the sanction

amount to the amount necessary to respond to the frivolous pleading. Additionally, the assessment of sanctions based upon what was found to be the subjective motivation of Fobian is contrary to Weigel v. Weigel, 467 NW2d 277, 282 (Iowa 1991) which requires a sanction assessment to be based solely on objective criteria. The sanctioned Defendants further contend that the determination that Defendants' post trial critical letter supports sanctions violates Fobians' right of freedom of speech under The First Amendment of the United States Constitution and Article I, section 7 of the Iowa Constitution and is contrary to the decision of Brown v. District Court of Webster County, 158 NW2d 744, 747 (Iowa 1968).

BRIEF

A. I. Factual Summary

This is a factually complicated real estate case. Simplified, C.J. Land desired to buy a vacant property on which to build a restaurant. It negotiated with Gateway, Ltd (at the time owned by Jerry Eyman) for the purchase of an unbuilt space in a platted condominium development. It eventually bought and received a deed for Lot 2B in this development. (Transcript Page 91-92, App-0252; Ex. 11, App. Page 222)

Fobian Farms, Inc. held second and third mortgage on Lot 2B and Hills Bank held the first mortgage on this lot. (Ex. 10 App. Page 220; App. Page 255-230)

Unfortunately there were two different condominium plats. These two plats showed Lot 2B as being in two different locations. Further, C.J. Land eventually built its restaurant largely on land that was not within Lot 2B under either of these two plats. (Ex. 10; App. Page 138,203,237)

C.J. Land purchased Lot 2B from Gateway, Ltd which as stated was owned by Jerry Eyman. C.J. Land did not negotiate for a mortgage release directly with Fobian-instead these negotiations were conducted between Jerry Eyman and Carl Fobian, the president of Fobian Farms. There was a sharp difference between the testimony of Fobian and Eyman regarding these negotiations. Fobian testified that the parties intended to release a mortgage on the northerly property while Eyman contended that the mortgage release was for the southerly property. At the time these mortgages were granted only one plat existed and Lot 2B was platted as the northerly property which Fobian testified he intended to release from Fobian's mortgages. (Transcript Page 234-236, 605-611, 675-676; App. Page 255-256, 267-270, 276)

After buying and receiving a deed and mortgage release for Lot 2B, C.J. Land built its restaurant. Unfortunately, as indicated above, the restaurant was

built partially on the northern lot and largely on the southern lot. This southern lot was not Lot 2B under either of the two condominium plats.

Hills Bank, the holder of the first mortgage, started a foreclosure proceeding which named Fobian Farms as the Defendant. To protect its second and third mortgage liens, Fobian paid $525,000.00 to acquire the Hills Bank's first mortgage and thereafter pursued the foreclosure and eventually acquired a sheriff's deed. (Transcript Page 548-550, 624-628, Ex. 14; App. Page 265-266, 273-275, 232)

C.J. Land commenced its action to have the deeds and mortgage releases reformed to convey it clear title to the property that it actually built on. In this litigation Fobian Farms asserted a counterclaim for interference with a prospective business advantage. This counterclaim was dismissed by summary judgement and thereafter was not pursued. (Appendix Page 56)

The Trial Court granted C.J. Land's request to reform the deed but also awarded money damages to Fobian for C.J. Land's trespass on what was found to be Fobian's property. It also assessed the entirety of Plaintiff's approximate $135,000.00 of legal expenses against Defendant Fobian as a Rule 1.413 sanction. Fobian appealed, and the Court of Appeals affirmed on the reformation issue but reversed and remanded on the sanctions issue. The Court of Appeals instructed the Trial Court on remand to reconsider the sanction issue in light of

several factors, including that (1) damages were awarded to Fobian for the trespass on its property (2) that Plaintiff would have incurred substantial legal expenses regardless of the conduct of Fobian, and (3) the minimum amount needed to deter Fobian. (Addendum Page ii; xxiv-xxv)

The Supreme Court denied further review. Carl Fobian then wrote a letter to the Supreme Court which criticized the Trial Court's decision but which in no way was profane, threatening or indicated that the Trial Court's decision would not be complied with. (Addendum Page i)

The matter then proceeded on remand. The Trial Court, citing Fobian's post-trial letter as justification, concluded that the minimum needed to deter Fobian was the full sanction amount. Contrary to the Court of Appeals remand order, it did not consider how much legal expense would have been incurred by Plaintiff regardless of any inappropriate conduct by Fobian and that Fobian was actually awarded damages. (Addendum Page xxviii; xxx-xxxii) A second appeal followed and the Court of Appeals affirmed the Trial Court's decision. (Addendum Page xxxiv-xxxv)

II. ARGUMENT.

A. Whether the Trial Court abused its discretion by assessing the Fobian Defendants the entire amount of Plaintiffs' legal expenses as a sanction under Iowa Rule of Civil Procedure 1.413 even though most of these expenses were not incurred as a result of properly sanctionable conduct.

Fobian was the defendant in this action and did not commence the same. The only claim that it made against C.J. Land was an interference with business advantage counterclaim which was dismissed by summary judgement and thereafter not pursued.

The trial court nevertheless concluded that the entirety of Plaintiff's expenses should be assessed against Fobian because it found Fobian's entire defense to be in bad faith. It specifically concluded that Fobian was "trying to get a free restaurant." (Remand Decision, Addendum Page xxxi) This finding, however is not supported by substantial evidence because it is undisputed that Fobian spent $525,000 to acquire the Hills Bank mortgage which it eventually foreclosed in order to acquire its claim to the property. (Transcript Page 614-616; App. Page 271-272; Ex. 13 and 38; App. Page 229 and 239)

Further, a Trial Court abuses its discretion when it awards sanctions based upon what it perceives to be the subjective intent of a litigant. Instead it is to look at the matter only objectively. Weigel v. Weigel, 467NW2d 277, 282 (Iowa 1991)

In the present case, Fobian held a sheriff's deed to the property in question and Fobian's claim was consistent with one of the properly recorded subdivision plats. Further, it also objectively clear that C.J. Land built its building on land that it did not have title to under any of the recorded documents. These are objective and valid grounds for defending against a quiet title/reformation action. Indeed, if Fobian did not have an objective claim to the property as shown by the public records there would have been no need to name it as a Defendant in this action. Further, since Iowa law makes reformation always a matter of judicial discretion, a titleholder like Fobian should always have a legal right to defend against a reformation claim. Kufer v. Kufer, 230 NW2d 500, 503 (Iowa 1979).

It is also an abuse of discretion to assess more than the legal expenses actually caused by a frivolous pleading as a sanction even if the Trial Court feels a higher amount is necessary to deter. This conclusion is required by the clear language of Rule 1.413 ("...reasonable expenses incurred by the filing...") and by Rowedder v. Anderson, 814 NW2d 585, 590 (Iowa 2012) and Everly v. Knoxville Community School District, 774 NW2d 488, 495 (Iowa 2009). See, also Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 218 (6th Circ. 1993); In Re. Kunstler, 914 F.2d 505, 523 (4th Circ. 1990); Mark S. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483, 506 (1986-87).

Assessing expenses unrelated to the sanctionable conduct is also an abandonment of the American rule which requires each party to pay its own legal expenses and is therefore contrary to Rowedder v. Anderson, 814 NW2d 585, 589 (Iowa 2012).

Finally, the Iowa Supreme Court should recognize that if Defendants such as Fobian can be sanctioned for defending against a claim, all Defendants are going to be faced with the Hobson's Choice of admitting the Plaintiff's claim or risking sanctions if they decide to require the Plaintiff to prove its case. Such a result is inconsistent with the idea that our court system should be available to all. If a Plaintiff feels that the defense lacks a proper basis it should pursue a summary judgement and thereby, if it is correct, avoid the need for a trial.

B. Whether the Trial Court abused its discretion by considering Fobian's post-trial, critical but not profane, threatening or disrespectful letter written to the Iowa Supreme Court in its decision to assess sanctions.

In a post appeal letter received by The Iowa Supreme Court on August 21, 2015 Carl Fobian expressed disappointment and frustration at the Trial Court's decision and the litigation process. This letter was not written to the Trial Court but was instead sent to the Supreme Court after it denied further review of the initial Court of Appeals decision. This letter was not libelous, threatening,

profane, obscene, or blatantly disrespectful. Nor did it ask the Supreme Court to take any further action on the case. (Addendum, p. i)

On remand the Trial Court concluded that this letter demonstrated a strong need to deter further conduct by Fobian Farms which violates Rule 1.413 and that it otherwise justified the sanction originally imposed. (Remand Decision, p. 6; Addendum p. xxxii)

However, because the letter contains no threat of further litigation and no indication that the Trial Court's decision would not be respected it does not provide substantial support for the conclusion that a large sanction is necessary to deter future sanctionable conduct. Instead, the letter is a citizen's expression of his opinion to a governmental authority. Accordingly it was an abuse of discretion to conclude that it justifies a sanction. See, Schettler v. Iowa District Court, 509 NW2d 459, 464 (Iowa 1993). Indeed, the Iowa Supreme Court has specifically ruled that a letter by a non-attorney litigant criticizing the court process or outcome is neither improper nor reason to punish a litigant. See, Brown v. District Court of Webster County, 158 NW 2d 744, 747 (Iowa 1968).

Additionally, because Fobian's letter was written by a private citizen, does not contain any threats, obscenities, or libelous content, and refers to a governmental process and government officials it should be considered protected free speech, and therefore neither sanctionable nor evidence of the need for

deterrence, under the First Amendment to the United States Constitution and separately under Article I, Section 7 of the Iowa Constitution. See, Bertrand v. Mullin, 846 NW2d 884, 892-893 (Iowa 2014).

Finally, since the letter was written well after the Trial Court's decision and was not part of the record on which the Trial Court based its initial decision it should not now be considered as justification for a sanction. In ruling otherwise the Trial Court abused its discretion as the grounds for sanction are to be determined as of the date of the unfounded pleading. See, Weigel v. Weigel, 467 NW2d 277-282 (Iowa 1991).

For the above reasons, relying on Fobian's letter as the basis for sanctions was an abuse of discretion.

II. CONCLUSION

The Supreme Court should grant further review in this matter and should reverse the decision of the Court of Appeals and Trial Court.

Respectfully Submitted,

BY: _____

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III. CERTIFICATE OF COMPLIANCE

1. This Application for Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [x] this Application for Further Review contains 2,856 words, excluding the parts of the Application for Further Review exempt by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] this Application for Further Review uses a monospaced typeface and contains _____ lines of text, excluding the part of the Application for Further Review exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [x] this Application for Further Review has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Times New Roman type face, or

   [ ] this Application for Further Review has been prepared in a monospaced typeface using size _____ with _____ typeface.

Craig Lee — 1/30/17

Signature — Date

IV. COST CERTIFICATE

The undersigned hereby certifies that the cost of obtaining the necessary copies of this document was $ N/A and that this amount has been paid by the undersigned.

Respectfully Submitted,

BY: Gg Gee

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V. PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 30 day of January, 2017, I electronically filed the foregoing with the Clerk of Court for the Supreme Court of Iowa. I certify that all participants in the case are registered electronic filing users and that service will be accomplished by the electronic filing.

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14-0309

FILED

AUG 21 2015

CLERK SUPREME COURT

To Whom It Concerns:

I am President of Fobian Farms Inc., a family farm corporation, 84 years of age, my wife is fighting for her very life suffering with cancer. In addition to this, we are facing a serious problem, not at all of our own making. I am writing you in hopes, you can possibly help advise me where to turn for real justice and a rapid conclusion. I have three separate issues concerning Johnson County, the State, and our court operation or lack of it. This concerns an action we should never have been allowed to be named in as "defendants". We have lost in a bench court, an appeals court rubber-stamped it, and the Supreme Court has denied the review of the case or suggests any solution. We expected a decision on legal terms we did not get and asked it to be reviewed on this basis by the Supreme Court. They have refused. #1 our most important issue had a simple "legal" solution, and should have been settled promptly. We were given title to our property. There was no reasonable reason we do not prevail, and should have long ago, if this had been approached in a correct manner. One of the attorneys we had used, a witness at this bench trial, had been in serious trouble, nearly disbarred, and the one representing us has now been disbarred for actions, committed at the very time of the trial to my knowledge, faced jail time then, unbeknown to us at least. The Judge may have been aware of this as neither one had his respect. The question we have are: Can one rely on the long time recorded records of the county in dealing with real-estate transactions? If not, why not, and if not where does one go for accurate, legal data? This has been the norm for years. Is a long established county sponsored public auction a legal sale on accurate and well-defined county recorded property? This sale was a sheriffs' sale, thoroughly and properly advertised in three separate news exposures as recorded in county records in the local newspaper for all to see? There were no objections at the oral, well detailed and explained sale. The developer and owners were present. Can a determination by a lower court be allowed to stand on totally false facts, easily disapproved by available recorded data, then the Supreme Court denying it to be heard? Can a surveyed document, since recorded, approved by all seven offices in the county, after being requested and presented by the then owner and developer of same when thus recorded, then being used and accepted as security on a properly recorded mortgage be ignored and disposed of by a judge? I can't believe it can. The judge used false facts of record stating we owned property when we were only mortgage owners at that time and that we were obtaining "free property" that our money had financed and was our security on this mortgaged property. He simply did not understand real estate law and our attorney had his mind elsewhere on his own troubles. This property was security of a $430,000 note owed by that owner. Can a court get by with, as it seems to me, assisting a person in creating a scam, using a shell-game, replacing, moving, removing, and selling recorded mortgaged property, not released, encroaching, ruining the value there of? All this without proper compensation and/or damages to the party who had all along had this very property as security on a large loan and also later legibly purchased it? Can a court ignore the recorded data and totally eliminate a secured mortgage? We were originally simply holders of a second mortgage for some $431,000 properly recorded. Our money was used to build this property, improve this secured property. Then when Hills Bank foreclosed, in order to protect our second mortgage without disbanding or losing it, we acquired this first lien position, buying this property months later, fair and square. It should have been over then. We had made absolutely no deals, no transactions with the parties that brought suit on us. NONE!! This did not involve us directly and should never been allowed to proceed against us. Is this America? We positively did nothing wrong, yet we now face the loss of money we borrowed, loaned out, lawyer fees, receiving no damage awarded for a ruined lot, a life destroyed all with the assistance of the court. Was it a bank too large and influential to fail? Our rights have certainly been violated. We had had no dealings with these parties. Official county records were there for everyone to see. Who is responsible for our loss? This has to be answered and addressed. We followed the letter of the law the entire way. We did nothing wrong!!! We will stand behind and back every statement herein. We were mortgage holders only to begin with and later legally purchased same. These are the facts!!! As law-abiding, tax paying citizens we ask your help now. Is it possible to take this issue to the US Supreme Court?

I respect our court system, but there is something terribly wrong here. Money can not be allowed to rule, we are not dealing in politics. Our other two issues with Johnson County concerns the counties' refusal to declare a "lot line" on property they none the less tax us on. The other issue is the counties refusal to grant a relocation of a driveway now in a dangerous location. This current dangerous driveway is below a hill on a busy highway. The safe spot would be on top of the hill. There would be no expense to the County and this is a no-brainer, yet they refuse. Who do we turn to on this serious issue that could result in a fatality? Modern farming practices require long semi tractor trailers. They need sight distance and can block both lanes momentarily exiting a field.

Sincerely,

Carl A. Fobian 8-24-15

Carl Fobian

Mr. Carl Fobian
3639 Oasis Rd NE
West Branch, IA 52358-9545

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IN THE COURT OF APPEALS OF IOWA

No. 14-0309
Filed June 10, 2015

FIRST AMERICAN BANK and C.J. LAND, L.L.C.,
Plaintiffs-Appellees,

vs.

FOBIAN FARMS, INC., HOOVER HIGHWAY BUSINESS PARK, INC., and GATEWAY, LTD.,
Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County, Ian K. Thornhill, Judge.

The defendants appeal from the district court's ruling in action to quiet title.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Gregg Geerdes, Iowa City, for appellants.

Mark A. Roberts, Lynn W. Hartman, and Dawn M. Gibson of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellees.

Heard by Danilson, C.J., and Vaitheswaran and Doyle, JJ.

DANILSON, C.J.

To be or not 2B, that is the question.[1] This appeal involves the issues of whether a deed to unit 2B should be reformed to legally describe unit 2A, and if a sheriff's deed and related instruments reciting unit 2A should be reformed to identify unit 2B.

Fobian Farms, Inc., Hoover Highway Business Park, Inc., and Gateway Ltd. appeal from the district court's ruling in an action to quiet title, initiated by C.J. Land, L.L.C. and First American Bank (hereinafter collectively referred to as the plaintiffs).[2] Fobian Farms[3] maintains the district court's ruling to quiet title to the restaurant site and reform the corresponding legal documents was not equitable. Fobian Farms also maintains the district court abused its discretion in assessing sanctions against Fobian Farms for violating the rule governing certification of motions, pleadings, or other papers.

Because we find there was a mutual mistake made in the expression of the deed and reformation is an appropriate remedy, we affirm the district court's ruling to reform the corresponding legal documents. We modify the district court's ruling to grant an easement for the 1.3 foot strip for so long as the current restaurant building exists rather than what appears to be a forced sale of the strip. We find the district court did not abuse its discretion in assessing

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[1] "To be or not to be" originates in William Shakespeare's *The Tragedy of Hamlet Prince of Denmark* 156 (Sylvan Barnet, 2006).

[2] Carl Fobian is owner and shareholder of Hoover Highway Business Park, Inc. He is also the president and CEO of Fobian Farms. Fobian Farms deeded its interest in the property in question to Hoover Highway Business Park.

At the time of the trial, Carl Fobian had acquired Gateway Ltd. from Jerry Eyman, but Eyman was the president of Gateway during all of the conveyances in question.

[3] We refer the group of defendants/appellants as Fobian Farms throughout. We refer to Carl Fobian as Fobian.

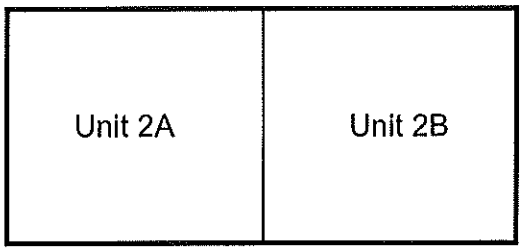
sanctions. However, because the court failed to make the necessary findings to determine if the amount of the award is appropriate, we remand to the district court to make the required specific findings and reconsider the amount of sanctions awarded.

I. Background Facts and Proceedings.

This case involves a real estate dispute over units 2A and 2B within a horizontal property regime—a type of cooperative association.

In a horizontal property regime, there is only one lot. The lot is then further subdivided into "buildings." Buildings may be divided into multiple units. An outside party purchases or leases a unit from the association.[4]

Jerry L. Eyman was the president of the developer, Gateway Ltd. Eyman and Gatway Ltd. established the horizontal property regime in question. In the original 1999 plat of the regime, the two units in dispute—and building 2—were oriented in an east-west configuration. Unit 2A was placed to the west of unit 2B.

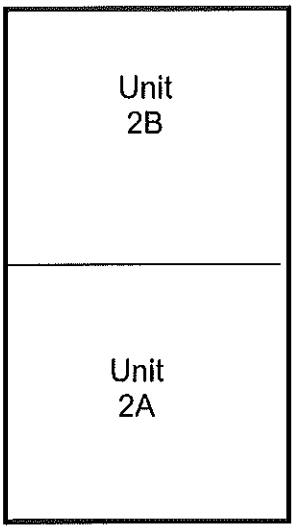


Building 2: 1999 Plat

The 1999 plat was amended in 2007, which reoriented building 2 to a north-south configuration, with unit 2A south of unit 2B.

[4] The horizontal property regime is governed by Iowa Code chapter 499B (1999).

IV



Building 2: 2007 Plat

In the 2007 plat, all north-south buildings were aligned alphabetically from north to south except building 2.

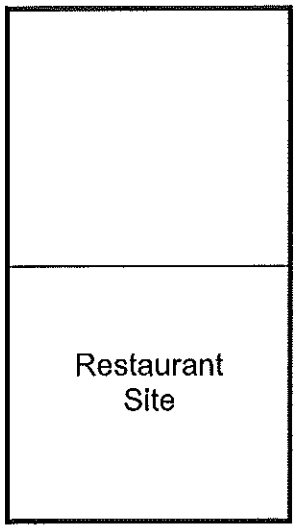
Sometime before 2007, Carl Fobian, president of Fobian Farms, loaned Eyman and Gateway Ltd. money. To secure his interest, Fobian received the second mortgage on the unsold buildings of the property regime—including Building 2. Fobian recorded the mortgage on May 16, 2007. Hills Bank and Trust held a first mortgage upon the property.

Joe Burnett, president of C.J. Land, met Eyman in 2007 and discussed the possibility of purchasing a unit in the development to build a restaurant.

In June 2008, Eyman asked Fobian to sign a partial release so C.J. Land could buy a unit. On June 17, 2008, Fobian signed the partial release, releasing unit 2B from the second mortgage. The release referenced the 1999 plat, not the 2007 plat. At the time he signed the release, Fobian was aware that C.J. Land intended to purchase the lot to build a restaurant.

On June 30, 2008, C.J. Land recorded a warranty deed from Gateway Ltd. Although C.J. Land negotiated with Gateway Ltd. for the southern lot for more

exposure to a nearby highway, the deed stated it was for unit 2B and referenced the legal description from the 1999 plat. C.J. Land then hired Eyman as general contractor and built a restaurant on the south unit of building 2.



Although the unit was 75 feet by 60 feet in size,[5] the restaurant was built one foot longer than the size of the unit. Additionally, a large meat smoker and air conditioner units were placed outside the footprint of the unit. The restaurant cost approximately $1.1 million to construct and was substantially complete by July 31, 2009.

Gateway Ltd. ultimately defaulted on the mortgages secured by the unsold units in the horizontal property regime, and the bank began a foreclosure action. Fobian Farms, holding a junior mortgage on the property, was named as a defendant in the action. Fobian then purchased the bank's interest and, stepping into the position previously held by the bank, continued the foreclosure action. Using a credit bid, Fobian purchased the sheriff's deed to the unsold property in the development on July 6, 2010, including unit 2A. Like the previous legal

[5] Both units 2A and 2B were 75 feet by 60 feet in size.

documents, the sheriff's deed references the 1999 Declaration recorded in Book 2672, Page 212 in Johnson County, Iowa, without reference to the 2007 plat.

On July 30, 2010, the licensed land surveyors who had prepared and filed the 2007 plat filed an affidavit, stating, "[S]crivener's errors have been detected on the plat and in accordance with the provisions of Chapter 354.24, Code of Iowa, the following corrections should be substituted: the north unit of building 2 should be 2A not 2B; the south unit of building 2 should be 2B not 2A."

About one year late—on June 29, 2011—Fobian Farms filed a lawsuit against the land surveyors for filing the affidavit. The petition alleged that "[t]he conduct of the defendants in this action constitutes a disparagement or slander of the title of plaintiff" and asked the court "for judgment against defendants in an amount sufficient to compensate it for the damages sustained."

On September 2, 2011, the land surveyors filed an "explanatory and corrective surveyors' affidavit." The purpose of the affidavit was to "withdraw, negate, and void the [original] Affidavit . . . and return the Unit numbering to the state in which it existed prior to execution and recording of that Affidavit." The lawsuit was subsequently dismissed against the surveyors.

On March 7, 2012, the plaintiffs filed a petition to quiet title and reform mortgage and deeds. The plaintiffs asked the district court to quiet title to the property on which they had built the restaurant.

On May 3, 2012, Fobian filed an answer as well as a counterclaim that alleged C.J. Land had interfered with a prospective business advantage by building upon land it did not own. Fobian also asserted a third-party cross claim

against Eyman for negligent misrepresentation and a similar claim against the third party Hills Bank & Trust.

C.J. Land and the bank resisted Fobian's counterclaims and third-party claims. They also filed motions of summary judgment and a motion for sanctions against the defendants.

On January 24, 2013, the district court ruled on the motion for summary judgment, granting both C.J. Land's and the bank's motions for summary judgment and dismissing Fobian's counterclaims and third-party claims. The court ordered that the plaintiff's motion for sanctions would be considered by the trial judge at the time of trial.

The matter proceeded to a bench trial March 5–7, 2013.

At trial, Eyman testified that part of the reason for amending the orientation of Building 2 in 2007 was because C.J. Land had approached him about purchasing land in the development and wanted a site next to the highway for visibility purposes. He testified that he intended to sell the south unit of Building 2 to C.J. Land and believed he had done so because he did not realize the amended plot had incorrectly labeled unit 2B north of unit 2A. Eyman testified he first learned of the scrivener's error when Fobian told him in late July 2010. Eyman then immediately asked the surveyors to fix the mistake, and as a result, they filed the July 30, 2010 affidavit. Eyman also testified that Fobian's attorney approached him in June 2011 with handwritten notes from Fobian, which included a strategy of how Fobian planned to obtain the building on the restaurant site. Through his attorney, Fobian indicated he would forgive a large portion of Eyman's debt if he went along with the strategy, but Eyman refused.

Burnett also testified at trial. As president of C.J. Land, he explained he intended to purchase the south unit in Building 2 and he had "no doubt" he had done so when he purchased unit 2B. Burnett first met Fobian after the sheriff's sale. C.J. Land previously had an agreement with Eyman to use one of the unpurchased lots for overflow parking and in exchange, C.J. Land maintained the lot and carried insurance on it. Burnett contacted Fobian within a few days of the sheriff's sale to see if the agreement could be continued. Fobian agreed, and his attorney drew up a contract to memorialize the agreement. They signed the lease agreement on July 20, 2010. Burnett testified that Fobian did not make any claims to owning the restaurant at that time. On July 27, 2010, Fobian's attorney sent C.J. Land's attorney a letter stating that Fobian owned lot 2A, which was the south lot on which the restaurant was built. According to Burnett, this is the first he learned of the dispute.

Fobian's attorney, Joseph Keele, testified as well. He testified he and Fobian discovered that C.J. Land had built on the wrong lot as they were preparing to go forward with the sheriff's sale and purchase the mortgages from the bank. He testified that even though he knew there was a building on the lot, he did not go inspect the building. He only knew that the auditor's website indicated there was a building on the property. Also, even though he knew it was a possibility someone else had an ownership interest in the piece of property, neither he nor Fobian were concerned by that.

Fobian testified Eyman had taken him to the development before he signed the release in order for C.J. Land to buy the unit. He claimed Eyman told him he needed him to release 2B, the north end of Building 2, so C.J. Land could

build a restaurant. He maintains Eyman told him that C.J. Land wanted the north unit to build the restaurant and then intended to eventually buy the south unit as well in order to construct a beer tent or patio area. Fobian testified that he saw C.J. Land building the restaurant on the wrong unit, but he said nothing because, "It was not [his] business. If they wanted to improve [his] equity, that was none of [his] business." He maintained that he would not have purchased the mortgages from the bank if the restaurant was not included.

Fobian agreed that the first time he met Burnett was when they discussed the lease for the overflow parking, but Fobian testified he told Burnett, "[W]e now own the bar and will be wanting some lease payments from it," at that time. He admits he never received any lease payments from C.J. Land. Fobian also testified regarding his handwritten notes setting out his strategy that had been previously admitted. Fobian agreed he wrote them but testified that he did not give them to his attorney and, in fact, was unsure how his attorney got them. Fobian testified he never meant for his attorney to give them to Eyman because he wrote them for his "personal use."

On rebuttal, Eyman testified he had never shown Fobian where C.J. Land intended to construct the restaurant. Eyman also disputed he had told Fobian that C.J. Land intended to purchase unit 2A at some point in the future to build a beer garden or patio.

The trial court issued a written ruling on August 28, 2013. The court found that Eyman and Burnett had credibly testified about their intention to sell and buy, respectively, the south unit of Building 2. The court also found that the surveyors had accidentally switched the numbering of Building 2 on the 2007 plat, a fact

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neither Burnett nor Eyman were aware of—nor should have been aware of—at the time of the sale. The court also explicitly found that the testimony of Attorney Keele was not credible. The court stated:

> The Fobian Parties either knew that C.J. Land began constructing the restaurant on a parcel owned by Fobian Parties and said nothing, or later discovered the mistake and seek what would amount to a free restaurant. It is undisputed that Mr. Fobian saw the restaurant construction and made no objection during the construction. At best, Mr. Fobian's conduct could be characterized as inequitable and unfair, and his failure to act at the time the restaurant was being constructed estops him and his business entities from complaining about any resulting encroachment.

Thus, the court quieted the title to the restaurant site with C.J. Land as "absolute title holder, subject only to the FAB Mortgage and restrictions of record" and reformed the necessary legal documents. Additionally, the court ordered the plaintiffs to file, within thirty days, "a written request specifying the amount of costs and attorney fees they seek in conjunction with the claims they have successfully stated in this matter." The court entered judgment in favor of Fobian and against C.J. Land for the value of the north encroachment, and set the value at $2101.45.

On September 26, 2013, the plaintiffs filed an application for attorney fees and expenses. The district court filed a written ruling on February 11, 2014. The court found that Iowa Code section 649.5 limited the possible award of attorney fees to the amount of forty dollars. However, the court found that Iowa Rule of Civil Procedure 1.413 provided another basis of recovery, stating "that the actions taken by the Fobian Parties in defending against Plaintiffs' claims and in filing their own claims were frivolous and used for an improper purpose." The court concluded that all of the fees sought by the plaintiffs were reasonable and

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awarded "attorney fees in the amount of $135,696.50, plus expenses in the amount of $7,094.53, and expert expenses in the amount of $2,636.44."[6]

Fobian appeals.

II. Standard of Review.

We review the district court's ruling in a quiet title action de novo. *Stecklein v. City of Cascade,* 639 N.W.2d 335, 336 (Iowa 2005). We give weight to the district court's findings, but we are not bound by them. *Id.*

We review a district court's order imposing sanctions under our rules of civil procedure for an abuse of discretion. *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009). An abuse of discretion occurs "when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993). An erroneous application of the law is clearly untenable. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997). When we review for an abuse of discretion, we will correct an erroneous application of the law. *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991).

III. Discussion.

Fobian Farms maintains the district court's ruling to quiet title to the restaurant site in favor of the plaintiffs and reforming the corresponding legal documents was not equitable. Fobian Farms also maintains the district court abused its discretion in assessing sanctions against it.

[6] The court then deducted the amount C.J. Land owed Fobian for payment of taxes for the restaurant site, which totaled $36,643.00.

A. Reformation.

Fobian maintains the district court's decision to quiet title and reform the corresponding legal documents was inequitable because the plaintiffs failed to show that the instruments do not reflect the true intention of the parties and Fobian had no duty to alert C.J. Land they were building on property it did not own.

The court, sitting in equity, has the power to grant reformation of an instrument. *Walnut St. Baptist Church v. Oliphant*, 135 N.W.2d 97, 101 (Iowa 1965). "Equity is not bound by forms, fiction, or technical rules, but will seek and determine the true situation." *Hosteng Concrete & Gravel, Inc. v. Tullar*, 524 N.W.2d 445, 448 (Iowa Ct. App. 1994). "The burden of proof is upon the party requesting the reformation and the evidence must be clear and convincing." *Walnut*, 135 N.W.2d at 101. The requesting party "has the burden of proving by clear, satisfactory, and convincing evidence that the contract does not reflect the true intent of the parties, either because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one part and fraud or inequitable conduct on the part of the other." *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 855 (Iowa 1999). "The person seeking reformation must also establish that the true intention of the parties which would be reflected in a reformed document constituted an undertaking that the parties had the power and capacity to perform." *Kendall v. Lowther*, 356 N.W.2d 181, 187 (Iowa 1984). "In reforming the instrument, the court does not change the agreement between the parties, but changes the drafted instrument to conform to the real agreement." *Wellman*, 454 N.W.2d at 855. Reformation may be ordered against a party to a deed, "a

person in privity with a party, or a person with notice of the relevant facts." *Orr v. Mortvedt*, 735 N.W.2d 610, 613 (Iowa 2007).

1. Issues not preserved. On appeal Fobian Farms has raised several arguments to reject reformation that were not properly preserved. Specifically, Fobian Farms contends the district court's decision is contrary to the Iowa Title Standards and Iowa law regarding the conveyance of condominiums, the after-acquired property clauses of the mortgages impose a lien on the southerly lot in Building 2, and C.J. Land and First American Bank are responsible for their own negligence in failing to review public records. Because Fobian failed to make these arguments before the district court and did not include them in their rule 1.904 motion to amend or enlarge, we will not consider them on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide on them on appeal.").

2. Mutual mistake. Although we are not bound by them, we are persuaded by the district court's express credibility findings regarding both Eyman's testimony he intended to sell and Burnett's testimony he intended to buy the southerly unit as a restaurant site. In fact, Eyman stated that part of the reason the 1999 plat was amended in 2007 was to reorient Building 2 so C.J. Land could have the south unit with visibility from the highway. Additionally, the district court expressly found neither Eyman nor Burnett was aware of the scrivener's error on the 2007 plat at the time Eyman sought and received releases from Fobian and the bank holding the senior mortgage. Thus there was a mutual mistake of fact in the expression of the contract not disputed by the

parties to the deed. *See Nichols v. City of Evansdale*, 687 N.W.2d 562, 570–71 (Iowa 2004) (holding reformation is proper when the mistake—mutual or unilateral—was made drawing the instrument). We also note that the mistake was not limited to the unit but also to the reference to the 1999 plat in all conveyances.

In respect to the claim of negligence, one authority has noted:

> It has been said that mere negligence in executing or accepting a written contract is not a bar to reformation where the ground for relief is mutual mistake. Mistakes nearly always presuppose negligence, and so it is evident that the rule which permits reformation on the ground of mutual mistake does not contemplate that mere negligence will bar an action for reformation. More precisely, it is held that a failure to exercise care and caution when executing or accepting a written instrument is not a defense to reformation where the neglect or omission has not harmed the person against whom relief is sought, but where the neglect has resulted in harm to the other party, reformation will be denied.

M.L. Cross, *Negligence in Executing Contract as Affecting Right to Have it Reformed*, 81 A.L.R.2d 7 (1962).

3. Intention of parties. Fobian Farms maintains the plaintiffs were not entitled to reformation because they failed to prove the instruments do not reflect the true intent of the parties.[7] Here, some of the difficulty lies with the fact that

[7] In passing, Fobian wrongly maintains that the plaintiffs' exclusive remedy was to file a claim pursuant to Iowa Code chapter 560, which deals with the rights of occupying claimants. As stated in section 560.1, chapter 560 only applies when "an occupant . . . has in good faith made valuable improvements thereon, and is thereafter adjudged not to be the owner." Here, the only party that made improvements to any land was C.J. Land, and it had an honest belief in its ownership of the southerly unit. *In re Estate of Waterman*, 847 N.W.2d 560, 571–72 (Iowa 2014) (holding that under chapter 560, an occupant need only have a subjective belief it owned the property upon which improvements are made.)

the district court reformed seven documents which were completed at different times and between various parties.[8]

Fobian Farms argues that without testimony from a representative from the banks, there is no way to know what they intended at the time they released Eyman and Gateway Ltd. from the mortgage on unit 2B and whether they were laboring under the same mistake. However, Fobian Farms can only recover, or in this case, defend, on the strength of its own title, not on the weakness of the plaintiffs. *See Jacobs v. Miller*, 111 N.W.2d 673, 674 (Iowa 1961). Thus, Fobian Farms cannot rely upon defenses of other parties to support its claim.

Moreover, our supreme court has stated that reformation may be granted against a party with notice of the relevant facts as long as the party is not an innocent third person. *Orr*, 735 N.W.2d at 613.[9] We also observe one authority has recited the general rule:

> If a mistake of description occurs in a series of conveyances under circumstances that would entitle any one of the vendees to a reformation as against the immediate vendor, equity will work back through all and give the last vendee a right of reformation against the original vendor. Where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all and entitle the last vendee to a reformation against the original grantor.

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[8] The district court reformed (1) the partial release of real estate mortgage by Fobian to Gateway Ltd. and Eyman, (2) the partial release of real estate mortgage from the bank to Gateway Ltd. and Eyman, (3) the warranty deed from Gateway Ltd. to C.J. Land, (4) mortgage executed by C.J. Land to its bank, (5) the assignment of mortgages from the bank to Fobian, (6) the sheriff's deed for unit 2A to Fobian, and (7) the warranty deed from Fobian to Hoover Highway Business Park.

[9] We also note Gateway, a party to the deed and this action, was also in privity with both C.J. Land and Fobian Farms.

M.C.D., *Right of Present Claimant of Title as against Original or Intermediate Grantor to Reformation to Correct Error in Description Common to Conveyances in Chain of Title*, 89 A.L.R. 1444 (1934) (internal citation and quotation marks omitted); *see, e.g.*, *Stewart v. Brand*, 23 Iowa 477 (1867) (holding that the mortgagee of a devisee of land that had been deeded to the testatrix by her husband could have a mistake in the description of the deed reformed).

4. Bona fide purchaser—innocent third party. Fobian Farms is not entitled to protection as a bona fide purchaser or innocent third person under these facts. Fobian Farms concedes in its brief that uncontradicted testimony of Carl Fobian and his attorney establishes that they knew the restaurant was on unit 2A before the sheriff's sale. Because Fobian also knew that he signed a release for unit 2B and knew of C.J. Land's intent to build a restaurant on the site it purchased, Fobian Farms was aware of the mutual mistake between C.J. Land, Eyman, and Gateway. In fact, Fobian Farms maintains it was its intent to take advantage of the mistake to its financial gain. Thus, Fobian Farms has actual notice of C.J. Land's outstanding claim to the property and improvements prior to the sheriff's sale. *See Waterman*, 847 N.W.2d at 571–72 ("In quiet title scenarios, the good faith standard requires a purchaser to show the purchase was made without either actual or constructive notice of existing rights in the property." (Internal quotation marks omitted)). The same principle applies to conveyance by a sheriff's deed. *Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 911 (Iowa 1977).

5. Remedy. To deny the plaintiffs reformation of Fobian Farms' sheriff's deed as well as the subsequent deed to Fobian's other corporate entity, Hoover

Highway Business Park, would result in a windfall to Fobian and his two corporate entities. Fobian Farms held a second mortgage to the entire Building 2 and agreed to a mortgage release of one of the units for the sole purpose that the unit could be sold and a restaurant built upon it. Fobian insisted on a partial payment towards the mortgage before executing the release in June 2008, more than two years before receiving the sheriff's deed. The evidence reflects that before the restaurant was built, both units had approximately the same value and now the southerly lot has a restaurant built upon it and is valued at approximately $1.1 million. We affirm the relief granted to reform all instruments identified by the district court.

B. Encroachment.

Although Fobian Farms' pleadings fail to raise the issue regarding the encroachments, we deem this issue litigated by consent.

Fobian Farms maintains it had no duty to alert C.J. Land it was building on land it did not own and it cannot be held negatively accountable for failing to do so. Here, the district court cited case law for the proposition that a party may be estopped from complaining about a resulting encroachment if they knew of the encroachment at the time the neighbor built valuable improvements and failed to object. *See Ivener v. Cowan*, 175 N.W.2d 121, 124 (Iowa 1970). However, the district court did not find Fobian Farms was estopped from asserting its claim. The court did not hold Fobian Farms negatively accountable for failing to warn C.J. Land it was building on property it did not own.

However, at the time the restaurant was substantially completed in July 2009, it encroached upon the northerly unit, and the current owner was Gateway.

Further, as we have stated previously, "the purchaser at a sheriff's sale acquires title subject to any defects for which he may be on notice." *JP Morgan Chase Bank Nat'l Ass'n v. Hawkins*, No. 10-1015, 2011 WL 662671, at *2 (Iowa Ct. App. Feb. 23, 2011) (citing *Hamsmith v. Espy*, 19 Iowa 444, 446 (1865) ("The law proclaims in the ears of all who propose to buy—*caveat emptor*, and look out, take notice, beware of the title for which you bid."). The sheriff only sells the interest or estate of the judgment debtor. *Hamsmith*, 19 Iowa at 446.

Although Fobian Farms should have been put on notice of the encroachment before the sheriff's sale, there is no evidence Fobian Farms had actual notice of the encroachment, and based upon his intention to take advantage of the mistaken description, Fobian thought it was buying the unit with the restaurant. Further, the plaintiffs have challenged the award of damages for the encroachment on appeal.

As our supreme court has noted, "[F]ail[ing] to remove from the land a thing which [a person] is under a duty to remove" constitutes a trespass. *Nichols*, 687 N.W.2d at 572 (citing Restatement (Second) of Torts § 158(c) (1982)). The supreme court also noted that where injunctive relief is not warranted, damages may be awarded in an "amount of the diminution in value of the property value caused by the encroachment or the cost to remove the encroachment." *Nichols*, 687 N.W.2d at 573.

Here the cost of removing the encroachment far exceeds the diminution of value to the property. Joe Burnett, president of C.J. Land, testified it would be cheaper to bulldoze the building and start over than to attempt to remove the encroachment.

The damages assessed were reasonable and only challenged by Fobian Farms on appeal. However, we modify the district court's ruling to grant an easement for the 1.3 foot strip for so long as the current restaurant building exists rather than what appears to be a forced sale of the strip.

C. Sanctions.

On appeal,[10] Fobian Farms maintains the district court abused its discretion in assessing approximately $145,000 sanctions against Fobian Farms, Hoover Highway Business Park, Inc., and Gateway, Ltd. for violation of Iowa Rule of Civil Procedure 1.413(1). Fobian Farms maintains the court abused its discretion because (1) the claims and defenses of Fobian were not frivolous, (2) the court considered inappropriate factors in assessing the sanction, and (3) the court failed to make the necessary findings to justify the sanctions. In the alternative, Fobian Farms maintains that even if Iowa Rule of Civil Procedure 1.413 was applicable, the amount of sanctions is not appropriate and the sanctions should have only been assessed against Fobian Farms' trial counsel.

Iowa Rule of Civil Procedure 1.413 provides, in pertinent part:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith

[10] The proper method of review of the imposition of sanctions is by writ of certiorari. *Mathias v. Glandon*, 448 N.W.2d 443, 445 (Iowa 1989). "[A]lthough this action is styled as an appeal, we treat it as a petition for a writ of certiorari to the extent it challenges the aware of sanctions in this matter." *Everly*, 774 N.W.2d at 492; *see also* Iowa R. App. P. 6.108 ("If any case is initiated by a notice of appeal . . . and the appellate court determines another form of review was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been requested.").

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argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party.

In an in-depth discussion of the rule, our supreme court stated:

> The rule creates three duties known as the "reading, inquiry, and purpose elements." Each duty is independent of the others, and a breach of one duty is a violation of the rule. If a document is signed in violation of rule 1.413, the court is required to impose an appropriate sanction.
>
> Compliance with the rule is determined as of the time the paper is filed. Counsel's conduct is measured by an objective, not subjective, standard of reasonableness under the circumstances. "The test is 'reasonableness under the circumstances,' and the standard to be used is that of a reasonably competent attorney admitted to practice before the district court." The reasonableness of the signer's inquiry into the facts and law depends on a number of factors, including, but not limited to: (a) the amount of time available to the signer to investigate the facts and research and analyze the relevant legal issues; (b) the complexity of the factual and legal issues in question; (c) the extent to which pre-signing investigation was feasible; (d) the extent to which pertinent facts were in the possession of the opponent or third parties or otherwise not readily available to the signer; (e) the clarity or ambiguity of existing law; (f) the plausibility of the legal positions asserted; (g) the knowledge of the signer; (h) whether the signer is an attorney or pro se litigant; (i) the extent to which counsel relied upon his or her client for the facts underlying the pleading, motion, or other paper; (j) the extent to which counsel had to rely upon his or her client for facts underlying the pleading, motion, or other paper; and (k) the resources available to devote to the inquiries.
>
> One of the primary goals of the rule is to maintain a high degree of professionalism in the practice of law. The rule is intended to discourage parties and counsel from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other

> papers. Sanctions are meant to avoid the general cost to the judicial system in terms of wasted time and money. "The 'improper purpose' clause seeks to eliminate tactics that divert attention from the relevant issues, waste time, and serve to trivialize the adjudicatory process." However, a party or his attorney need not act in subjective bad faith or with malice to trigger a violation. A party or his attorney cannot use ignorance of the law or legal procedure as an excuse. The rule "'was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, professional incompetence.'"

Barnhill v. Iowa Dist. Court for Polk Cnty., 765 N.W.2d 267, 273 (Iowa 2009) (internal citation omitted).

Fobian Farms maintains their claims were not frivolous because "Fobian Farms held valid, non-frivolous claims to the property on which C.J. Land wrongfully build its restaurants" and "had the right to defend itself against C.J. Land's quiet title action." Fobian Farms also asserts that because C.J. Land undisputedly built outside the unit, even if the dispute over the orientation of units A and B did not exist, there would still have been the issue of encroachment to be decided. Fobian Farms points out that the district court entered judgment for $2101.45 in its favor on the encroachment issue.

In its ruling on attorney fees, the district court stated:

> It is clear to the Court, especially considering the testimony of Mr. Fobian and Attorney Keele, that the actions of the Fobian Parties in defending against Plaintiff's claims and asserting [sic] Fobian Parties' [sic] claims were of the type that Rule 1.413 was intended to address. Based on the Court's assessment of the testimony offered at trial, there is a high likelihood that the Fobian Defendants saw the mistake in the property descriptions as an opportunity to get a free restaurant. Rather than work with the Plaintiffs to rectify the mistake before this litigation was filed, the Fobian Defendants instead chose to pursue improper claims that delayed this process and wasted the resources and times of the parties, and required the use of extensive resources by the Court to resolve the issues presented by this action.

Fobian Farms argues that because the claims were based on recognized causes of actions, they cannot be frivolous. However rule 1.413 requires that the claims are "well grounded in fact *and* is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; *and* that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation." (Emphasis added.)

Here, the district court found that Fobian Farms' claims were made for "improper purpose" and were not "well grounded in fact." In support of sanctions, we note after the mistake was discovered, Eyman asked the surveyors to correct the scrivener's error and they complied by filing an affidavit correcting the mistake, but Fobian bullied the surveyors with litigation until they recanted their affidavit. Additionally, Fobian asked Eyman to help him with his improper plan of claiming ownership of the restaurant and offered to reduce Eyman's outstanding debt if he did so. Fobian then tried to "make someone pay" by the initiation of his claims after this action was initiated.

Fobian Farms next maintains the district court considered an improper factor when assessing the award because the court referred to its failure to work with the plaintiffs to rectify the mistake. Fobian Farms cites *Kendall v. Lowther*, 356 N.W.2d 181, 191 (Iowa 1984), for the proposition that failure to settle is not proper grounds for assessing fees. In *Kendall*, the court stated, "While we encourage parties to negotiate fair settlements, we will not penalize those who prefer a final judicial determination of their rights." 356 N.W.2d at 191. However, the court was considering the defendant's claim that the district court erred in

assessing the plaintiffs' attorney fees against them because the plaintiffs "had taken an unreasonable bargaining position during pre-settlement discussions." *Id.* The court explicitly found that there was no question the plaintiffs brought their claim in good faith. *Id.* Here, the district court was not penalizing Fobian Farms for refusing to settle, but rather for asserting counterclaims and third-party claims which were not brought in good faith.

Fobian Farms also contends the district court failed to make the necessary findings in order to assess sanctions. The district court is required "to determine the appropriate amount of a sanction after making specific findings as to (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the violation." *Rowedder v. Anderson*, 814 N.W.2d 585, 590 (Iowa 2012) (internal quotation marks omitted). Here, the district court found that all of the plaintiffs' attorney fees were reasonable and ordered Fobian Farms to pay them in their entirety. However, the court did not consider the minimum to deter nor the parties' ability to pay. In fact, the record does not contain evidence of any of the three parties' ability to pay the $145,000 award.

While we do not find the district court abused its discretion in assessing sanctions, the district court did not make the specific findings necessary to determine whether the amount of the sanctions are appropriate. One of the difficulties here is that not all of Fobian's claims were against the plaintiffs, and the plaintiffs are not entitled to recover their attorney fees for any improper claims brought against other parties except to the extent additional time was expended by counsel during pretrial proceedings where the plaintiffs were required to also

participate. Moreover, some time would have been expended on this suit notwithstanding the actions of Fobian, and there is no explanation of how much approximated time was expended by the plaintiffs' counsel to address any unwarranted claim or pretrial proceedings, or any needless extension of the time in trial. We also note the encroachment issue was meritoriously decided in favor of Fobian. There is also no delineation between the three sanctioned parties or explanation how or why each should be separately sanctioned. Thus, we remand to the district court to make the required specific findings and reconsider the amount of sanctions awarded. *See Everly*, 774 N.W.2d at 495–96 (remanding to the district court to make specific findings and award sanctions consistent with those findings).

IV. Conclusion.

Because we find there was a mutual mistake made in the expression of the deed and reformation is an appropriate remedy, we affirm the district court's ruling to reform the corresponding legal documents. We modify the district court's ruling to grant an easement for the 1.3 foot strip for so long as the current restaurant building exists rather than what appears to be a forced sale of the strip. We find the district court did not abuse its discretion in assessing sanctions. However, because the court failed to make the necessary findings to determine if the amount of the award is appropriate, we remand to the district court to make the required specific findings and reconsider the amount of sanctions awarded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

State of Iowa Courts

Case Number	Case Title
14-0309	First American Bank v. Fobian Farms

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IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

First American Bank and C.J. Land, L.L.C., Plaintiffs, vs. Fobian Farms, Inc., Hoover Highway Business Park, Inc., Gateway, Ltd., Gateway Commercial Condominiums Owners Association, Jerry L. Eyman, and Jan G. Eyman, Defendants.	)	No. EQCV074310 RULING ON REMAND
Fobian Farms, Inc., Cross-Claim Plaintiff, vs. Jerry L. Eyman and Gateway Commercial Condominiums Owners Association, Cross-Claim Defendants.	)	

On this 28th day of March, 2016, the above-captioned matter came before the undersigned pursuant to the terms of the Court's January 15, 2016 Order Re: Briefing on Remand (file-stamped January 19, 2016). The parties now have briefed their positions regarding this Court's entry of sanctions. Having considered the file, relevant case law, and written briefs of the parties on remand, the Court hereby enters the following ruling.

The Iowa Court of Appeals issued an opinion on the appeal of this matter on June 10, 2015. The Court of Appeals affirmed in part and reversed in part this Court's ruling on Plaintiffs' quiet title action. For the purposes of this Ruling on Remand, the Court notes that this Court assessed sanctions against Fobian Farms, Hoover Highway Business Park, Inc. and Gateway, Ltd. (hereinafter the Fobian Defendants) for violation of Iowa Rule of Civil Procedure 1.413(1). The Court of Appeals reversed this Court on this issue, finding:

> While we do not find the district court abused its discretion in assessing sanctions, the district court did not make the specific findings necessary to determine whether the amount of the sanctions are appropriate. One of the difficulties here is that not all of Fobian's claims were against the plaintiffs, and the plaintiffs are not entitled to recover

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> their attorney fees for any improper claims brought against other parties except to the extent additional time was expended by counsel during pretrial proceedings where the plaintiffs were required to also participate. Moreover, some time would have been expended on this suit notwithstanding the actions of Fobian, and there is no explanation of how much approximated time was expended by the plaintiffs' counsel to address any unwarranted claim or pretrial proceedings, or any needless extension of the time in trial. We also note the encroachment issue was meritoriously decided in favor of Fobian. There is also no delineation between the three sanctioned parties or explanation how or why each should be separately sanctioned. Thus, we remand to the district court to make the required specific findings and reconsider the amount of sanctions awarded.

First American Bank v. Fobian Farms, Inc., No. 14-0309, 2015 WL 3613379, *12 (Iowa Ct. App. 2015). The Court of Appeals specifically stated that this Court "did not consider the minimum to deter nor the parties' ability to pay." Id.

Based on the opinion of the Court of Appeals, this Court directed the parties to submit briefs addressing the issues of the minimum to deter and of the Fobian Defendants' ability to pay the award previously ordered by this Court. See Order Re: Briefing on Remand, filed January 15, 2016. The parties now have filed briefing for the Court's review, and the Court incorporates as if set forth in full herein the content of its previous orders entered in this matter, as well as the appeal decision by the Iowa Court of Appeals.

Plaintiffs have argued that the full amount of CJ Land's fees and expenses is the minimum amount necessary to deter the sanctionable conduct. Plaintiffs point out that Carl Fobian sent a letter (dated August 21, 2015) to the Iowa Supreme Court, in which Mr. Fobian generally complains that he was treated poorly by the court system, and specifically states:

> Can a determination by a lower court be allowed to stand on totally false facts, easily disapproved (sic) by available recorded data, then the Supreme Court denying it to be heard? Can a surveyed document, since recorded, approved by all seven offices in the county, after being requested and presented by the then owner and developer of same when thus recorded, then being used and accepted as security on a properly recorded mortgage be ignored and disposed of by a judge? I can't believe it can. The judge used false facts of record stating we owned property when we were only mortgage owners at that time and that we were obtaining "free property" that our money had financed and was our security on this mortgaged property. He simply did not understand real estate law and our attorney had his mind elsewhere on his own troubles.

See Plaintiffs' Exhibit A. Plaintiffs contend that even after the Iowa Supreme Court denied further review in this matter, the Fobian Defendants continued to pursue frivolous arguments that delayed the issuance of the Procedendo in this matter, and the Fobian Defendants have engaged in a pattern or practice of misuse of the judicial system.

Plaintiffs further argue that the Fobian Defendants bear the burden of proof regarding their ability to pay, and at no point in their Resistance to Plaintiffs' Application for Fees did the Fobian Defendants assert they had limited ability to pay attorney fees.

Finally, Plaintiffs argue that the Fobian Defendants can afford to pay the sanction assessed against them. Plaintiffs point out that, at trial, Mr. Fobian stated he is the President and CEO of Fobian Farms, and that he made substantial real estate purchases, including purchase of the Hills Bank interest in the property for $525,000, as well as his other involvement in lending substantial sums. Plaintiffs note that the Fobian Defendants have posted an appeal bond of $119,662.92, which was filed within a month of the judgment entry. Plaintiffs claim this shows that there is an ability on the part of the Fobian Defendants to pay the sanction imposed.

For their brief, the Fobian Defendants first argue that, in calculating the minimum amount needed to deter, the Court should consider that the Fobian Defendants are not attorneys. The Fobian Defendants claim they should not be charged with the same level of legal knowledge and expertise as are licensed attorneys, which should lessen the amount needed to deter their conduct.

The Fobian Defendants also argue that the minimum necessary to deter should not exceed a portion of the legal expense associated with reasonably defending against the sanctioned Counterclaim, and should not be based on any pretrial conduct. The Fobian Defendants question whether services billed by Plaintiffs' counsel may be excessive or unnecessary, and only a reasonable fraction of the total expenses properly attributable to defending against the sanctioned conduct is the minimum amount needed to deter.

The Fobian Defendants' next argument is that, in determining the amount needed to deter, this Court should not consider the Fobian Defendants' decision to seek a court decision on Plaintiffs' claims. The Fobian Defendants assert that, as Defendants, they did not have the option of discontinuing the core litigation since the case was filed against them by Plaintiffs. The Fobian Defendants further assert that the underlying lawsuit resulted in the Fobian Defendants being awarded compensation, which establishes that they had a valid legal interest at stake. The Fobian Defendants contend that the fact that Plaintiffs did not file a motion for summary judgment is recognition that the Fobian Defendants' defense was not frivolous.

The Fobian Defendants contend that the minimum amount needed to deter should be calculated so as to avoid undue chilling of a defendant's rights, and in determining the need to deter, the Court should recognize that the Fobian Defendants exercised restraint by making certain admissions that reduced the issues for trial; they did not pursue their Counterclaim following summary judgment; and there is no history of sanctionable conduct on the part of the Fobian Defendants in this or any other litigation.

Finally, with respect to the ability to pay, the Fobian Defendants argue they already have invested a considerable sum of money in the Gateway project, and they stand to lose a large portion of this investment, which hinders their ability to pay. The Fobian Defendants assert that the current decline in Iowa's agricultural economy is an aggravating condition. Finally, the Fobian Defendants state they have no insurance covering any of their losses or legal expenses, and they already have suffered a substantial loss in this matter and stand to lose more.

Iowa Rule of Civil Procedure 1.413(1) provides:

> Pleadings need not be verified unless special statutes so require and, where a pleading is verified, it is not necessary that subsequent pleadings be verified unless special statutes so require. Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party. This rule does not apply to disclosures, discovery requests, responses, objections, and motions under rules 1.500 through 1.517, which are governed by rule 1.503(6).

I.R.Civ.P. 1.413(1). On appeal, the Iowa Court of Appeals held that this Court "is required 'to determine the appropriate amount of a sanction after making specific findings as to (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the violation.'" First American Bank, 2015 WL 3613379, *12 (citing Rowedder v. Anderson, 814 N.W.2d 585, 590 (Iowa 2012)). The Court of Appeals specifically found that this Court "did not consider the minimum to deter nor the parties' ability to pay." Id.

In applying the Rowedder factors to this action, the Court first considers the reasonableness of Plaintiffs' attorney's fees. As to this factor, the Court reiterates the findings and conclusions it made in its February 10, 2014 Ruling (file-stamped February 11, 2014):

> The Court has reviewed the Non-Redacted Attorney Fees submitted by Plaintiff on November 13, 2013, in support of the Application. The Court concludes all of the fees sought by Plaintiff are reasonable. This was a contentious matter that Plaintiffs made every effort to resolve before bringing this action. The Foblan Parties went on to file numerous claims of their own. A number of parties were required to be brought into this case. The hourly rates and fees charged by Plaintiffs' attorneys are reasonable in light of their experience and quality of the work product they have developed on behalf of their clients. Therefore, Plaintiffs are entitled to attorney fees in the amount of $135,696.50, plus expenses in the amount of $7,094.53, and expert expenses in the amount of $2,636.44. The Court will deduct from the total of these amounts the fee for taxes owed by C.J. Land to the Foblan Parties, which is $36,643.00.

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See Ruling, filed February 10, 2014, p. 5. The Court finds nothing in the record that persuades or requires the Court to alter its findings as to the reasonableness of Plaintiffs' attorney's fees. Therefore, the first factor from Rowedder has been satisfied.

The Court turns to the second Rowedder factor, which is the minimum amount of sanctions that will be required to deter improper future behavior by the Fobian Defendants. The Court first reiterates and adopts the following findings and conclusions made in the February 10, 2014 Ruling:

> It is clear to the Court, especially considering the testimony of Mr. Fobian and Attorney Keele, that the actions of the Fobian Parties in defending against Plaintiffs' claims and asserting the Fobian Parties' own claims were of the type that Rule 1.413 was intended to address. Based on the Court's assessment of the testimony offered at trial, there is a high likelihood that the Fobian Defendants saw the mistake in the property descriptions as an opportunity to get a free restaurant. Rather than work with Plaintiffs to rectify the mistake before this litigation was filed, the Fobian Defendants instead chose to pursue improper claims that delayed this process and wasted the resources and time of the parties, and required the use of extensive resources by the Court to resolve the issues presented by this action.

See Ruling, filed February 10, 2014, p. 5.

The Iowa Court of Appeals specifically set forth the following portion of this Court's trial ruling:

> The Fobian Parties either knew that C.J. Land began constructing the restaurant on a parcel owned by Fobian Parties and said nothing, or later discovered the mistake and seek what would amount to a free restaurant. It is undisputed that Mr. Fobian saw the restaurant construction and made no objection during the construction. At best, Mr. Fobian's conduct could be characterized as inequitable and unfair, and his failure to act at the time the restaurant was being constructed estops him and his business entities from complaining about any resulting encroachment.

Id. *4. The Court of Appeals itself held that "Fobian Farms maintains it was its intent to take advantage of the mistake to its financial gain." Id. at *8. The Court of Appeals also described Mr. Fobian's behavior as follows:

> In support of sanctions, we note after the mistake was discovered, Eyman asked the surveyors to correct the scrivener's error and they complied by filing an affidavit correcting the mistake, but **Fobian bullied the surveyors with litigation until they recanted their affidavit.** Additionally, Fobian asked Eyman to help him with his improper plan of claiming ownership of the restaurant and offered to reduce Eyman's outstanding debt if he did so. **Fobian then tried to "make someone pay" by the initiation of his claims after this action was initiated.**

Id. at *11 (emphasis added).

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The Court of Appeals did not have available for its benefit, as this Court does, the letter written to the Iowa Supreme Court following the issuance of the Court of Appeals' opinion. See Plaintiff's Exhibit A.

A sanction of all of the fees and expenses described in the Court's February 10, 2014 Ruling clearly is the minimum necessary to deter the type of misconduct engaged in by the Fobian Defendants. The Fobian Defendants, led by Mr. Fobian himself, have continued to question and challenge valid court orders that have resolved the property dispute among the parties, and have, throughout this litigation, made improper assertions and claims that have wasted the time and resources of the parties and of this Court. There is little doubt that the type of conduct engaged in by the Fobian Defendants is the type of conduct that warrants severe sanctions. It is clear to the Court, particularly in light of the August 21, 2015 letter that Mr. Fobian wrote to the Iowa Supreme Court, that Mr. Fobian (acting for the Fobian Defendants) views himself as being above the law and outside of the applicability of well-founded legal principles. If severe sanctions are not imposed on the Fobian Defendants, the Court has no doubt Mr. Fobian and entities on whose behalf he acts will continue to engage in such behavior in attempts to pursue financial gain. The Iowa Court of Appeals itself described Mr. Fobian's behavior as bullying, and noted that it was Mr. Fobian's intent to try to "make someone pay" as a result of the mistake that led to the filing of this action. First American Bank, 2015 WL 3613379, *11. The second factor from Rowedder has been satisfied.

The Court next considers the Fobian Defendants' ability to pay. The Court is convinced that the Fobian Defendants have the ability to pay the sanctions amount previously awarded by the Court. As Plaintiffs point out, Mr. Fobian testified at trial that he was able to bid $525,000 to purchase the Hills Bank interest in the property. See Plaintiffs' Exhibit B. It is also the Court's recollection that Mr. Fobian testified at trial as to other substantial real estate purchases he has made. Further, the Fobian Defendants were able to post a bond in the amount of $119,662.92, which is 110% of the judgment amount of $108,784.47. The Fobian Defendants have shown no specific facts as to what portion of their investment in the Gateway project they will lose, or how their general description of a decline in Iowa's agricultural economy has affected them. While the Court has collectively referred to Fobian Farms, Hoover Highway Business Park, Inc. and Gateway, Ltd. as the Fobian Defendants and has assessed the sanctions against all three entities, the Court notes that the Fobian Defendants have made no attempt to distinguish one entity from the other, and the Court is convinced that Mr. Fobian is the driving force behind the decisions made by all three entities. The Fobian Defendants have the ability to pay the full sanctions amount, and the third Rowedder factor has been satisfied.

Finally, as to the factors related to the severity of the violation, the Court specifically relies on the discussion relating to the second Rowedder factor as setting forth the factors that relate to the severity of the violation. Based on said discussion, the fourth Rowedder factor has been satisfied.

As the Court previously has noted, there is a bond totaling $119,662.92, which is being held by the Johnson County Clerk of Court, and which needs to be distributed. The bond amount is significant. Rather than entering an order at this time that the bond amount be paid over

directly to Plaintiffs in the amount of $108,784.47, with the remainder paid to the Fobian Defendants, the Court will give the parties an opportunity to brief their positions with respect to distribution of the bond amount before any further orders are entered regarding distribution of the bond. Therefore, the parties are granted fourteen (14) days from the date of this Ruling to submit to this Court, in writing, their positions as to whether it is appropriate for the Court to order that the amount of $108,784.47 be paid from the bond directly to Plaintiffs to satisfy their judgment, with the remainder of the bond to be returned to the Fobian Defendants. After the expiration of this fourteen (14) day period, the file shall be returned to the undersigned for entry of further orders regarding distribution of the bond amount.

Clerk to notify.

IAN K. THORNHILL, JUDGE
Sixth Judicial District of Iowa

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IN THE COURT OF APPEALS OF IOWA

No. 16-0624
Filed January 11, 2017

FIRST AMERICAN BANK and C.J. LAND, L.L.C.,
Plaintiffs-Appellees,

vs.

FOBIAN FARMS, INC., HOOVER HIGHWAY BUSINESS PARK, INC., and GATEWAY, LTD.,
Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County, Ian K. Thornhill, Judge.

Fobian Farms, Inc. challenges the district court's ruling on remand arguing it abused its discretion in imposing sanctions. **WRIT ANNULLED.**

Gregg A. Geerdes, Iowa City, for appellants.

Mark A. Roberts, Lynn W. Hartman, and Dawn M. Gibson of Simmons Perrine Moyer Bergman P.L.C., Cedar Rapids, for appellees.

Considered by Vogel, P.J., and Tabor and Mullins, JJ.

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MULLINS, Judge.

This case was previously before this court and was remanded to the district court to make required specific findings and reconsider the amount of the sanctions. *See First Am. Bank v. Fobian Farms, Inc.*, No. 14-0309, 2015 WL 3613379, at *12 (Iowa Ct. App. June 10, 2015). Fobian Farms, Inc. challenges the district court's ruling on remand arguing it abused its discretion in several respects.[1]

"A district court's order imposing sanctions under our rules of civil procedure is reviewable for an abuse of discretion." *Everly*, 774 N.W.2d at 492. An abuse occurs "when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993). On our review for an abuse of discretion, we will correct erroneous applications of law. *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991).

On remand, the district court entered an order directing the parties to submit briefs on the remaining issues. After the parties submitted their briefs, the court wrote a thorough opinion identifying and addressing the issues. The court showed it exercised its discretion by considering all the necessary factors. The reasons for its conclusions are not untenable and are not clearly unreasonable. We find no erroneous applications of law. Accordingly, we find the district court

[1] Fobian Farms filed an appeal. "The proper means to review a district court's order imposing sanctions is by writ of certiorari." *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009). Thus, we treat this appeal as a petition for a writ of certiorari. *See id.*

did not abuse its discretion. We annul the writ without further opinion. *See* Iowa Ct. R. 21.26(1)(d), (e).

WRIT ANNULLED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-0624	First American Bank v. Fobian Farms

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